

IN THE COURT OF CRIMINAL APPEALS

DONDRE JOHNSON,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

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NO. PD-0197-17

FILED
COURT OF CRIMINAL APPEALS
5/25/2017
ABEL ACOSTA, CLERK

*APPEALED FROM THE SECOND COURT OF APPEALS FOR THE
SECOND COURT OF APPEALS DISTRICT OF TEXAS, CAUSE NO. 02-15-
00357-CR; TRIAL COURT CAUSE NUMBER 1415600R, IN CRIMINAL
DISTRICT COURT NO.1 OF TARRANT COUNTY, TEXAS; THE HONORABLE
ELIZABETH BEACH, PRESIDING.*

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

THE CASE IN BRIEF

THE CHARGE THEFT OF PROPERTY.
[CR I-8; RR V-11-12].

THE PLEA..... NOT GUILTY.
[RR V-12].

THE VERDICT (Jury).....GUILTY.
[RR XI-83-85].

THE PUNISHMENT (Jury)2 YEARS STATE JAIL; \$10,000 FINE
(2 COUNTS, CONCURRENT).
[CR I-340, 343; RR XIII-54-55].

STATEMENT OF ORAL ARGUMENT

The Court has determined that oral argument will not be permitted in this case.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals, in a 2-1 decision, reversed the trial court's judgment and acquitted Appellant of two theft convictions on December 8, 2016. *See Johnson v. State*, 513 S.W.3d 190, 190 (Tex. App. – Fort Worth December 8, 2016, pet granted). The chief justice wrote a dissenting opinion. *See id.* at 201 (Livingston, C.J., dissenting).

The State filed a motion for rehearing and a motion for reconsideration *en banc* on January 5, 2017. The court of appeals overruled both on January 26, 2017. *See Order, Johnson v. State*, No. 02-15-00357-CR, January 27, 2017. Three justices indicated that they would grant the motion for reconsideration *en banc*.

The State filed a petition for discretionary review on March 1, 2017; Appellant filed a letter response on March 15, 2017. This court granted the State's petition on May 5, 2017. *See Order, Johnson v. State*, PD-0197-17, May 3, 2017.

QUESTIONS FOR REVIEW

1. In determining whether the evidence is legally sufficient to support the jury's verdicts, the court of appeals failed to measure the evidence, as the court interpreted the evidence, against a hypothetically correct jury charge that included, as the dissent pointed out, a full parties charge and a correct description of the financial instrument stolen, as required under *Garza Vega v. State*, 267 S.W.3d 912, 915-16 (Tex. Crim. App. 2008).

2. In determining whether the evidence is legally sufficient to support the jury's verdicts, the court of appeals erred in failing to view the evidence in the light most favorable to the jury's verdicts, thereby substituting its resolution of fact issues for that of the jury's. *See Adames v. State*, 353 S.W.3d 854, 861 (Tex. Crim. App. 2011); *see also Jackson v. Virginia*, 433 U.S. 307, 319 n.12 (1979).

STATEMENT OF FACTS

I. Appellant and the Johnson Family Mortuary

Appellant and his wife, Rachel Hardy Johnson,¹ owned and operated the Johnson Family Mortuary. [RR V-30, 95-96; VI-65; VIII-39-40; X-152-53; State's Exs. 1, 10, 70; Defense Ex. 1]. Appellant supervised the "day-to-day" operation of the mortuary. [RR V-111-12]. He talked to clients; negotiated contracts; received payments from clients; sent in the necessary requests for official documents; transported remains; delegated duties to employees and paid them, often in cash; and even participated in funerals on occasion. [RR V-234-35; VIII-38, 47-48, 50, 53, 58, 70-71, 106-07; IX-47-50, 61-62, 66-67, 69-70, 189; X-141-42; XI-12; State's Ex. 10].

¹ The court of appeals refers to Appellant's wife as "Hardy," rather than Johnson.

As Appellant himself admitted, his wife primarily handled the accounts; she was listed as the owner on the lease and corporate filings and was the only person authorized on the firm's bank accounts. [RR V-36, 103, 111-12, 123, 246-47; VIII-39-40, 53-54, 73; X-147-48; State's Exs. 10 & 70]. She became less involved in the daily business of the mortuary as the years passed, however, particularly, as Appellant observed to investigators, after she had the couple's baby in early 2014. [RR VIII-39-40, 53-54, 73; State's Ex. 10].

Business had been good the first year of the mortuary's operation, but in the middle of the second, in 2013, it slowed. [RR VIII-73, 156-59; State's Ex. 60]. By the end of 2013, the combined balances of the mortuary and a tax filing firm run by the Johnsons – the accounts were regularly commingled – were negative. [RR VIII-150-52, 155-160; XI-39-40, 42; X-44-46; State's Ex. 60]. Large influxes of cash, primarily through the tax filing company, had been going in and out, making it impossible to trace how the money was being spent. [RR VIII-139-41, 144-46; XI-40; X-38-40, 44-47; State's Exs. 58 & 59]. A large number of obviously personal expenses were also charged to the accounts. [RR VIII-144-46; XI-40; X-40-43, 45-46; State's Exs. 58 & 59].

The pattern for 2014 was similar. Appellant confessed to investigators that the first four months of the year had "been the worst ever, business-wise," and

attributed the problems to “competition” from other mortuaries. [State’s Ex. 10]. The accounts started with high balances at the beginning of the year, but by mid-May the combined balance of all the accounts was less than \$2,000. [RR VIII-164; XI-50]. As with earlier accounts, there were large deposits and withdrawals in cash, making it impossible to trace where the funds came from or how they were being spent. [RR VIII-164-65; X-48]. There were also significant payments made for obviously personal expenses. [RR VIII-169-178; X-33-36].

Appellant and the Johnson Family Mortuary had a poor reputation with industry insiders. One funeral industry worker, who knew Appellant from their time at school together, refused to ever take a check from him for work performed “because there were just reasons not to . . . out of knowing him.” [RR VIII-74-75]. At least two crematoriums required the mortuary to pay upfront before performing cremations, and one even instituted a policy of refusing to permit Appellant or the mortuary to store bodies in its crematorium freezer for even just a few days unless they brought the necessary cremation paperwork with them, after Appellant left the body of a five year old boy in their crematorium cooler for five months. [RR VIII-15; IX-9-10, 31, 62-63, 65, 78-79].

In addition to financial improprieties, Appellant and the mortuary flouted a number of rules and regulations of the funeral industry. Most significantly,

Appellant was not licensed as a “funeral director in charge” – a state licensed funeral director who is legally responsible for the day-to-day operations of any funeral home – yet he regularly discussed arrangements with clients, accepted payments, and managed funerals without supervision, in violation of the Texas Occupation Code. [RR VIII-65, 76-77, 79-80, 82, 85-86, 90-91, 102-03; IX-47-50, 61-62, 66-67, 69-70, 95-118-19, 189; State’s Exs. 10, 29, 46].

Every funeral home is legally required to have a funeral director in charge, or “FDIC,” and to file his name and license with the Texas Funeral Service Commission. [RR VIII-65, 79-80, 85; State’s Ex. 29]. Sometime around late February 2014, Appellant contacted Michael Pierce, whom he knew as a member of the “funeral service community.” [RR VIII-78-81; X-101]. Over the phone, Appellant explained that the mortuary needed an FDIC “for about three months,” and offered Pierce \$300 for being its FDIC, plus \$100 for every funeral he supervised, and \$75 for every management conference with a client. [RR VIII-82-85; X-100-01]. Believing he might be able to “straighten up” some “instability” at the mortuary, Pierce agreed. [RR VIII-83-85].

Pierce was only paid once, however, never attended a management conference, and only attended a single funeral, though he should have been notified of, and in specific instances participated in, any conference or service the

mortuary performed. [RR VIII-87-91]. Upon realizing sometime in April or May that he had not arranged the single funeral service he had attended at the mortuary, Pierce, “alarmed” that his license might be in jeopardy because the mortuary was not complying with State regulations regarding the participation of an FDIC in client meetings and funerals, submitted his resignation to the Funeral Service Commission. [RR VIII-89-91, 95-97; X-70-71, 76-79, 82-84, 86]. He took the additional step of asking the Commission to delete his license from the State-run Texas Electronic Registration system, or “TER,” through which a funeral home obtains the documents necessary to legally have a body cremated, which required an FDIC’s license and password. [RR VIII-67-69, 102; IX-137; X-163-64]. The Commission returned his withdrawal of FDIC on technical grounds in June; Pierce re-submitted it on July 1. [RR X-70-71, 76, 79; State’s Ex. 29]. He contacted the TER directly by phone the same day. [RR X-87].

In addition to meeting with families and making funeral arrangements, an FDIC is the only individual legally authorized to apply for a death certificate, which may then be used to obtain other necessary documentation to have a body cremated, such as a burial transit permit and cremation authority. [RR VIII- 66-67, 98-102; IX-8-9, 11, 15-16, 22-25, 103-07, 140-41, 143-45; X-131-34; State’s Ex. 11]. Both Appellant and Rachel Johnson were aware that transit permits and

cremation authority could not be obtained without a death certificate. [RR X-67, 71-72, 108; State's Exs. 10, 50, 57, 211; Defense Ex. 6]. Despite the fact that Pierce had not been involved in any way with meeting clients or arranging funerals, and had not authorized the Johnson Family Mortuary to enter information into the TER to obtain death certificates and other necessary documents, the mortuary had used his license and password – which Johnson herself had created for Pierce - at least 16 different times to apply for documents. [RR VIII-67, 69, 72, 97-100; X-96-100]. Indeed, one request for a death certificate submitted in Pierce's name appears to have been back-dated. [RR X-101-02]. Johnson was aware that death certificates and other documents were being obtained by the mortuary, and was aware that the mortuary had not paid an FDIC since the sole payment to Pierce, because the documents and other expenses were paid for from bank accounts over which Johnson had control. [State's Exs. 55, 57].

Moreover, many requests were improperly delayed. An FDIC is required to file a report of death within 24 hours and to obtain a death certificate no later than ten days after the date of death. [RR IX-98-99, 167; State's Ex. 12]. The entire process – picking up a body, obtaining a death certificate and other necessary documentation, and delivering the body to a crematorium - should usually take only five to eight working days. [RR IX-107-08].

Yet lengthy delays in obtaining the necessary documents were not unusual for Appellant and the Johnson Family Mortuary. The mortuary routinely waited days or even weeks to file a report of death, and often went months before they completed the process to obtain a death certificate. [State's Ex. 35]. As early as January, 2012, the Johnson Family Mortuary had taken possession of a body to be cremated, yet had failed to ever complete the necessary documentation. [RR IX-159-161]. In another instance in 2013, an infant was not cremated for more than a year and a half. [RR IX-147-51; X-138]. Delays between several weeks and up to six months were not uncommon. [RR IX-159-65; State's Ex. 81]. There were at least eleven instances where the mortuary had been hired to cremate bodies but the legally required paperwork was not completed, and in several cases, never even started. [RR VI-40-41, 512; VIII-108-113; IX-147-168, 181; X-98-99, 132-35, 143-44].

In at least three instances, Appellant gave family members ashes that he represented to be the ashes of a relative, when in fact, the necessary paperwork had not been completed and the body had not been cremated. [RR IX-148-51, 198-202, 230-43; XI-30]. In another instance, Appellant told family members that their father had been cremated and his ashes were contained in the casket at the

memorial service, and later interred at a veteran's cemetery, when the body was not actually cremated until almost six weeks later. [RR IX-217-225].

II. The Discovery of the Bodies

Jim Labenz, with two partners, re-started a wireless tower construction company in 2010. [RR V-26-27]. By late 2013 business was so good that they bought a warehouse just east of Highway Loop 820 between Rosedale and Lancaster. [RR V-27-28]. The property was a “a little bit bigger than [they] wanted,” but since a tenant was already in part of the building, they went ahead with the deal and purchased it in late February, 2014. [RR V-28-29]. The tenant was the Johnson Family Mortuary. [RR V-30-31, 50, 95-96; State's Ex. 1]. Their lease was up on March 31, but Appellant negotiated a new one with one of Labenz's partners. [RR V-30-31, 33-34, 36; Defense Ex. 1].

The mortuary paid the first month's rent under the new lease, for March 2014, to their old landlord's management company, who, after some delay, forwarded it to Labenz's partnership. [RR V-37-40, 45-47]. When April's rent became due, and he had not yet received the March payment either, Labenz began to call Appellant or drop by the mortuary several times a week to obtain the overdue rent; each time Appellant promised to look into the matter and “get the money to” him. [RR V-40-41].

By mid-May, Labenz got “more aggressive” about collecting the past-due rent, and began to contact Appellant more often. He became concerned when he noticed the dumpster outside the business had been taken away, suggesting that the mortuary had cancelled the service, but Appellant assured him it had been removed simply because neighbors had been dumping their own trash into it. [RR V-41-42]. By the end of May, Labenz left an eviction notice with the mortuary’s receptionist. [RR V-42-43]. The next day, Appellant stopped by Labenz’s office, promised a partial payment, and offered to work out a payment plan. [RR V-43].

Not having received any payment by June 3, Labenz changed the locks on the premises and posted a notice of eviction. [RR V-48-49, 53-54, 121-22, 162-63]. He was careful to leave Appellant access to the garage door and interior garage area in the rear of the building, so that mortuary personnel could retrieve any bodies that were present. [RR V-55-56, 162, 164; State’s Ex. 1].

Appellant appeared at Labenz’s office the day after being locked out. [RR V-57]. After discussing the situation with Appellant and a reality show producer who was in talks with Appellant about a possible show, Labenz agreed to let them back in if they paid one month’s full rent and devised a payment schedule under which they would catch up the rent that was in arrears. [RR V-57-58, 165]. Appellant brought a cashier’s check over a week later, but Labenz declined both a

check or cash, insisting that he wanted “something that is recorded” so that the payment would be documented. [RR V-58, 120].

By July 2, he had not received either an additional payment or a scheduling plan, though Labenz had seen or spoken to Appellant a number of times. [RR V-61-63, 118-19]. Appellant had offered a number of excuses, and had even claimed, when asked face to face for the overdue rent, that his wife was getting a payment from the bank as they talked, though Labenz never received it. [RR V-120].

That evening around 9:30 or 10:00 o’clock, Labenz drove by the mortuary after dark as a “security check” and saw Appellant and another man, both wearing white masks, “prepping a body or getting stuff, boxing up.” [RR V-62, 119]. Labenz made over a dozen phone calls to Appellant over the following two weeks, but Appellant did not answer and did not respond to the messages Labenz left. [RR V-63-65].

By July 15, Labenz had been calling Appellant “every day” for “well over” a dozen times, but had not been able to contact him nor had he seen any activity at the mortuary during business hours. [RR V-63-64]. That morning, he and his two partners happened to be in the office at the same time. [RR V-64-65]. After discussing the lack of activity at the mortuary, and suspecting that their tenant had

abandoned the lease, the trio decided to inspect the premises. [RR V-64-65, 117, 149-50, 166].

They noticed a “foul odor” as they stood outside on the sidewalk in front of the building. [RR V-66]. Labenz later described it as smelling like “a dead possum or just a rodent or something.” [RR V-66, 92-93]. One of the partners, a former firefighter who had smelled it before, “recognized immediately” that the “very distinct odor” was that of “a decaying body or some sort of bodily odor,” and informed his partners that the smell was from “some sort of decomposing body.” [RR V-167]. He was reluctant to go inside because he “didn’t want to see what I knew I was going to see.” [RR V-167-68].

The three entered through the front door, where the odor was so strong that they gestured to each other. [RR V-67]. They found a casket with a body in it in what was normally the sitting area, then walked back past the reception desk towards the chapel, where the odor was so overpowering they “couldn’t handle the smell.” [RR V-67]. They retreated back out outside. [RR V-67]. Realizing that there had been bodies in the back garage area only a few weeks ago, they “assumed” that there must still be some inside and so returned to confirm their suspicions. [RR V-67]. “Overwhelmed” by the smell, they stayed just long enough to determine that there were bodies in the garage area before going back

out. [RR V-67, 168].

They locked the building, went back to their office, and called the police on the non-emergency number. [RR V-68, 170]. After some miscommunication with responding officers, they returned to the building and led officers inside. [RR V-69-71]. With wet rags covering their noses and mouths, they walked to the back, turned on the light, and opened the garage door to let in light and air. [RR V-71].

Inside they found eight bodies – six adults and two infants – in varying degrees of decomposition because they had not been properly embalmed or refrigerated as required by the Health and Safety Code. [RR V-84-85, 261, 260, 263, 274; VI-33; State's Exs. 13, 229, 233, 235]. The first body, discovered in the viewing room inside the mortuary, was embalmed and ready to be transported out of the country. [RR VI-44, 46]. A second body, laid out on a coffee table in the embalming room, had become mummified, a condition that the M.E. had only encountered before in recovering bodies "that have been left in an abandoned house, a shut-in type person, someone that's gone through . . . several decompositional changes." [RR V-260, 263-65; State's Exs. 269- 270].

In the garage area, three more bodies were still in body bags, in violation of the Texas Administrative Code. [RR V-84-85, 169, 270, 272, 278-79; VI-15; State's Exs. 13, 233, 234, 271]. Buckets had been placed under several of the

gurneys on which the bodies lay to catch fluids as they dripped down, but the men, and later investigators, still had to watch their step to avoid places where fluids had “exploded” onto the floor and walls.² [RR V-85, 169, 174, 213, 279; VI-16; State’s Exs. 13, 234, 236, 279]. All of the bodies were decomposed and covered with “a large number of maggots, gnats, [and] pupa casing from flies that had hatched from maggots.” [RR V-274-75, 279; VI-12]. Another body was discovered in an open casket, “dressed as you might be for a funeral,” but decomposing. [RR VI-10; State’s Exs. 278-279].

Two infant remains were found near some stacked caskets. [RR VI-19]. One was in a small cardboard cremation casket, while the second was discovered in a “plastic bin” that had “tumbled off” the stacked caskets and had fallen behind them. [RR VI-19-20; State’s Ex. 281-82, 284-85]. The remains in the small casket had decomposed to the point that they had melted into the cardboard container in which they had been placed. [RR VI-19, 22-23; State’s Exs. 281-82]. The infant remains found in the plastic container were still wrapped in the blanket in which they had been brought from the hospital, though the remains had largely decomposed to the point of being liquefied. [RR VI-26-27, 29, 31; State’s Exs.

² After Appellant was formally evicted, Labenz and his partners had to hire a HAZMET team to clean the building in order to lease it again. [RR V-88-89, 91-92]. It cost “just under \$8,000.” [RR V-89, 150-51]. The HAZMET team found several boxes of ashes in the front reception area. [RR V-210, 215-19, 220, 223; State’s Exs. 218, 244, 247, 248, 259, 265].

284-85].

Investigators later recovered several boxes that contained cremains, and two empty boxes labeled “Aundrea Jones” and “Sandra Baldwin.” [RR VIII-42-43; XI-30-31]. The ashes were sent to the medical examiner’s office to be identified. [RR VIII-43; XI-31-32]. Later, upon hearing news about the discovery at the mortuary, several families brought ashes to the M.E. for identification, suspecting that they may have been given the wrong cremains. [RR VIII-43-44; XI-27-29].

The medical examiner, with Appellant’s help, was able to identify some of the remains on the premises. [RR V-252, 254, 259-60, 262]. The body in the viewing room was identified as Chewe Mwangilwa. [RR VI-44]. It had been embalmed and was accompanied with the proper paperwork to be transported out the country. [RR VI-44, 46].

Appellant identified the body in the embalming room as that of Patricia Baptiste, which the M.E. later confirmed. [RR V-266-68]. Of the bodies in the garage area, Appellant initially mis-identified the bodies of Karen Pearl Jones and Helen Jones, but after referring to paperwork in his office, concluded that he had confused the two, at the same time incorrectly calling Helen Jones “Sandra.” [RR V-269-270, 278]. Based on the identification tag from the hospital that was still tied to Karen Jones’s leg, and other identifying information, the medical examiner

confirmed the identities of Karen Jones and Helen Jones. [RR V-272-74, 276-78, 280-82; State's Exs. 271 & 272].

Appellant also initially mis-identified the body of Debra Whitney as that of "Debra Mills," but after again checking his records, corrected himself and properly identified the remains. [RR VI-10-12; State's Ex. 10]. Using the hospital tag still on the leg of the body and other identifying information, the M.E. confirmed that the remains were those of Debra Whitney. [RR VI-13-15; State's Exs. 22 & 23]. A body on a gurney in the corner of the garage Appellant identified as "Victoria Valquez," but after consulting his records he corrected it to Victoria Vasquez. [RR VI-17]. The medical examiner confirmed Appellant's corrected identification. [RR VI-17-18; State's Exs. 20 & 21].

Appellant identified the infant remains found in the cremation casket as those of "Baby Booker," but could provide no other information. [RR VI-19, 23; State's Ex. 10]. The medical examiner's office established that the remains were those of Malaysia Biscoe. [RR VI-23-25; State's Exs. 24-25]. Appellant could not identify the infant remains found in the plastic bin; he initially told investigators that the bin contained trash. [RR VI-25-26; State's Ex. 10]. Closer inspection revealed that the bin was labeled "Boy Desiree Williams," a common practice in hospitals to identify newborns by their mother's name. [RR VI-28-29]. The

medical examiner determined that the remains were those of Titus Harrison, alias “Baby Williams.” [RR VI-32-33; State’s Ex. 26-27].

Appellant appeared “void” of concern about the state the bodies were in, as though it were “everyday business,” and admitted only that he was “embarrassed” by the media attention the discovery had garnered. [RR VIII-31]. He had only “somewhat of a recollection” of the identities of the remains as he walked through the mortuary with the medical examiner. [RR VIII-32]. His wife, who joined them at the mortuary after being contacted by investigators, seemed not to have “any idea” who the bodies were. [RR VIII-32].

Detectives interviewed Appellant twice in the parking lot outside the mortuary, once before and once after he helped the medical examiner identify the bodies inside. [RR VIII-26, 28]. In the first interview, Appellant openly admitted that only two bodies were ready for cremation within the next several days; officers only uncovered the completed authorizations for one, Karen Jones, and the necessary paperwork for Chewie Mwangilwa to be transported out of the country. [RR VI-44-45, 51; VIII-19-22, 30-31; State’s Exs. 7A-E, 10]. Appellant also told officers that his wife “was the boss,” but when asked what his responsibilities at the mortuary were, he declared that he “ran” the business and “did everything.” [State’s Ex. 10]. Appellant insisted that he did most of the transportation of

remains personally; as he phrased it: “If you request Johnson, you get Johnson.” [RR VIII-38].

He misinformed officers that one didn’t need a license to run a funeral home, only to embalm or cremate bodies, which, he explained, he contracted out. [State’s Ex. 10]. Asked whether there were any other funeral directors at the mortuary, he identified Michael Pierce, but explained that Pierce had resigned weeks before “because he had other things.” [State’s Ex. 10].

During the second interview - after Appellant, the medical examiner, and investigators had walked through the building trying to identify bodies - Appellant acknowledged that maggots and other insects were crawling on the remains, but he sounded unperturbed, as though it were “normal everyday business.” [RR VIII-34-35; State’s Ex. 10]. Midway through the interview, Appellant started to distance himself from involvement, however, a tactic not uncommon among criminal suspects. [RR VIII-38]. He began to shift responsibility to others, specifically identifying several employees by name. [RR VIII-38-39]. Appellant was nevertheless emphatic that all the money passed through either his hands or his wife’s. [RR VIII-39-40]. He repeatedly denied that anyone had ever received the wrong ashes from the mortuary. [RR VIII-36, 40; State’s Ex. 10].

In the course of identifying the bodies found in the mortuary, the medical examiner's office determined the date of death for each of the remains. [RR VI-34]. Appellant could only produce complete documentation necessary for cremation or burial for Chewe Mwangilwa and Karen Jones. [RR VI-44, 45, 51; XI-138, 143-44]. The medical examiner identified the remains, death dates, and the length of time the mortuary had taken to obtain a death certificate:

<u>Name</u>	<u>Date of Death</u>	<u>Time to Obtain Death Certificate</u>
Patricia Baptiste	June 30, 2014	never completed
Karen Pearl Jones	March 25, 2014	4 mo., 21 days
Helen Jones	April 9, 2014	never sought
Victoria Vasquez	June 9, 2014	never sought
Deborah Whitney	May 5, 2014	never sought
Titus Harrison	May 1, 2014	not required
Malaysia Biscoe (Baby Booker)	January 2, 2013	not required

[RR VI-34-37; IX-139-68; State's Ex. 35].

Forensic accounting of the Johnsons' accounts revealed that there were sufficient funds in the Johnsons' commingled accounts to have each of the bodies cremated at local crematoriums around the time of each death. [RR VIII-176-86].

III. Appellant, the Remains, and the Families

A. Larry Ray Davis

Larry Ray Davis, a Vietnam veteran, died in a house fire on January 3, 2014. [RR IX-216]. His daughter, Nakia Davis, who had known Appellant for “many, many years” through their mutual participation in church choirs and “the Christian community,” contacted him to arrange a funeral service for her father in Fort Worth at the family’s church on January 11, 2014, and a memorial service in Dallas at the veterans’ cemetery two days later. [RR IX-218, 226]. The cremated remains were to be interred at DFW National Cemetery; the family planned to keep a small amount for keepsakes and mementos, however. [RR IX-219-21].

At Appellant’s suggestion, the family had a closed casket at the funeral in Fort Worth “to give the illusion of a body being there.” [RR IX-220]. Appellant assured the family that the cremated remains were inside the casket. [RR IX-220]. The ashes themselves would be interred at the National Cemetery. [RR IX-221].

Appellant brought what he purported to be Davis’s ashes to the interment ceremony on January 13, 2014. [RR IX-222]. Nakia, concerned that all her father’s ashes might be mistakenly interred, asked Appellant at the interment if she could have those ashes that were going to be kept by the family. [RR IX-223].

Appellant, arriving late to the service, acknowledged her request with a nod of his head, but did not say anything in reply. [RR IX-222-23].

Nakia and one of her sisters subsequently called Appellant numerous times to recover their father's ashes. [RR IX-223]. Nakia herself called him "every three days at least," while her sisters called once or twice a week. [RR IX-223-24]. Eventually, in the face of the women's "persistence," Appellant gave Nakia two "snack size" baggies of ashes at the end of February. [RR IX-224-25]. The family later discovered that Larry Davis had not been cremated until February 21. [RR IX-225].

B. Aundrea Marie Jones

Aundrea Marie Jones died on February 8, 2014. [RR IX-230]. Her death was not unexpected, and the family had made the necessary arrangements with Appellant in advance. [RR IX-230-31]. The funeral service was held on February 15, 2014. [RR IX-231]. Appellant had told Jones's daughters that they could pick up her ashes three days later. [RR IX-231-32].

The sisters nevertheless had to call Appellant "sometimes two or three times a day" for almost three weeks before Appellant gave what he represented to be their mother's ashes to another sister, though he had been specifically instructed to contact Felicia Braxton. [RR IX-233-34]. Suspicious of the delay, and the manner

in which Appellant had handled it, Braxton announced to her sisters that she believed the ashes they had been given were not those of their mother. [R IX-234-35]. Upon hearing of the discovery of their mother's body in the Johnson Mortuary on July 15, she began to call crematoriums in the area in order to determine whose remains they had been given. [RR IX-234-35]. She was informed that, based on the identity disk enclosed with the ashes, they were those of Opal Mae Anderson, who had died on December 8, 2012. [RR IX-164-65; 234-35; XI-30].

C. Karen Pearl Jones

Karen Pearl Jones suffered complications from diabetes, neuropathy, and COPD, though she was only 55 years old. [RR IX-187]. She died alone, spread out on her bed, where her boyfriend found her, on March 26, 2014. [RR IX-187, 189]. During her long illness, Jones often expressed her desire to be cremated, half-jokingly insisting that family members "better not let those bugs crawl on my body." [RR IX-195].

Her daughter, Michelle Jones-McElhanon, met Appellant at the mortuary and arranged to have "a full service," which specifically included embalming, a wake, a funeral service, and cremation. [RR IX-189-190]. Appellant broke down the cost of the various services, charging \$1,000 for cremation and \$3,025 for the

entire arrangements. [RR IX-190].

Jones-McElhanon quickly learned that her mother's insurance would not cover the cost of the funeral. [RR IX-191]. Not having enough herself, she solicited family and friends to contribute. [RR IX-191]. Since the money "trickled in" as loved ones contributed, Jones-McElhanon paid Appellant in small cash sums "every now and then." [RR IX-191]. Contributors included Jones-McElhanon's aunt, Lana Adewusi (\$1,400); her uncle, Tony Jones, owner of the "Little Texas Car Dealership," which also contributed; her brother, Eric Jones (\$200); and her aunt Connie Mabry (\$100). [RR IX-193]. She made her final payment to Appellant on April 2, 2014, and her aunt paid the balance shortly after. [RR IX-192, 201; State's Ex. 34].

The wake and funeral were conducted the next day. [RR IX-195-96]. Immediately after the service, Jones-McElhanon approached Appellant and asked how long it would take to receive her mother's ashes. [RR IX-195]. He informed her that "there were 30 bodies ahead of hers" so that it would "take awhile." [RR IX-195-96]. A week or ten days later, she called Appellant again. [RR IX-196]. Appellant responded that "she's not ready yet" but gave no other explanation. [RR IX-196].

Jones-McElhanon had signed a release for the Johnson Family Mortuary to transport her mother's body from the M.E.'s office to the funeral home on March 26th. [RR IX-188-89]. Nevertheless, the funeral home did not even start to obtain a death certificate by filing a "report of death" until April 7th, well after the 24 hours legally mandated for the filing of the document, and indeed, after the wake and funeral had been conducted. [RR IX-148-49, 195-96].

Jones-McElhanon called at least ten times over the next several weeks following the funeral, and even stopped by the mortuary to talk to Appellant. [RR IX-196-97]. Appellant claimed that the original death certificate had to be "amended," and that due to "an electronic situation" he would have to check to see if it were ready. [RR IX-197]. He showed her a death certificate that he had only applied for on May 6th, and he never obtained any of the other documents necessary to cremate Jones's remains. [RR IX-144-45, 150-52; State's Ex. 7A].

After six weeks, Appellant informed Jones-McElhanon that her mother's ashes were ready. [RR IX-198]. When she stopped by to retrieve them, Appellant handed her the ashes in a single box. [RR IX-198-99]. When Jones-McElhanon revealed that the family planned to spread the ashes between several urns, he volunteered to do it for them if she would bring him the ashes and urns when they obtained them. [RR IX-198-99]. It took some time to scrape up the money for the

urns, and in the meantime, the story about the mortuary broke. [RR IX-199]. Contacted by the medical examiner about her mother's remains, Jones-McElhanon turned over to investigators the ashes Appellant had given her. [RR IX-200-201; XI-30]. The cremains were later identified as those of Sandra Baldwin, who had died in 2012. [RR IX-160-61; XI-30].

D. Helen Jones

Helen Jones died of cancer on April 9, 2014, after a long illness. [RR VIII-104-06]. Her son, Frederick Jones, with several cousins and the family's pastor, met Appellant at the mortuary to make arrangements a week later on April 16th. [RR VIII-104-07]. They arranged a wake, funeral, and cremation for her and paid Appellant \$2,800 in cash. [RR VIII-106-08; State's Exs. 10, 30]. According to the mortuary's price list posted on its website, the minimum charge for cremation was \$995. [RR VIII-18-19; State's Ex. 76].

The wake was held that evening, and the funeral the next day. [RR VIII-108, 115]. After the funeral, Appellant told Frederick that he "didn't have anything to worry about" and that his mother's remains "were in good hands." [RR VIII-109]. When Frederick didn't hear from Appellant after two weeks, he phoned him. [RR VIII-109]. Appellant informed Jones that he had "sent off her body already" and was "going to call the state for a death certificate." [RR VIII-

109]. After another two weeks, Fredrick called Appellant again. [RR VIII-110]. Appellant repeated that he had “sent her body off” and complained that “he didn’t know what’s taking the state so long to get the death certificate.” [VIII-110]. In fact, Appellant had not yet even started the process to obtain one. [RR IX-152-54].

A week or two later, towards the end of May, Frederick finally reached Appellant after repeated calls. [RR VIII-111]. Appellant reported that he had Helen Jones’s remains, but that he still had not received the death certificate. [RR VIII-111]. He told Frederick that he could not pick up the ashes until he received the death certificate. [RR VIII-111]. Records later established that Appellant had never requested a death certificate, much less a cremation permit, before her body was discovered in the mortuary’s garage. [RR IX-152-53; X-143].

E. Titus Williams

Desiree Williams, an old friend of Appellant’s, spoke to him in early May 2014 after she suffered a miscarriage on May 1st. [RR V-229-30]. Because the infant, whom she and her husband named “Titus,” was a certain size and had survived for a few minutes after the miscarriage, she was required to have the tiny body buried or cremated. [RR V-228]. Williams met Appellant at the funeral home after being told by the hospital that the infant’s body had been picked up and transported there. [RR V-230-32]. Upon arriving, she asked to see the body, but

Appellant told her that it wasn't there because they hadn't picked up the body yet because "they were waiting on the paperwork." [RR V-231-32]. He assured her, however, that he would pick up the infant and she could view the body the next day. [RR V-232].

She called the funeral home the next day, but was suddenly disconnected. [RR V-232]. Appellant later called back from an "unknown number." [RR V-232-33]. When Williams returned to the funeral home later in the day, Appellant informed her that they had not retrieved the body, but "confirmed" that he would pick it up the following day. [RR V-232-33]. The next day he reported that the infant's body still had not been picked up, but he arranged to have a memorial service for the child and cremate the body for \$300 because Williams was "like family" to him. [RR V-234-35, 247-48]. Williams explained that she wanted the baby cremated so she could bring the ashes home with her. [RR V-233-34]. She paid Appellant in cash the following day, May 6. [RR V-235-36; State's Ex. 74]. Appellant informed her that the infant's body was "in the process" of being cremated. [RR V-235-37].

Three days later, on May 9, 2014, Appellant arranged a small service for Williams and close family. [RR V-234-35]. Appellant even "said a few words" and sang during the ceremony. [RR V-235, 249]. He explained to Williams that

the urn at the ceremony was empty because the infant was “in the process getting cremated.” [RR V-236-37]. Williams responded that she wanted her child’s ashes “as fast as possible” because she was “in grief.” [RR V-237]. Appellant assured her that it would take about a week. [RR V-237-38].

Almost a week later, not having heard from Appellant, Williams called the funeral home. [RR V-237-39]. Again the phone was disconnected, and again, Appellant returned the call from an “unknown” number. [RR V-238-39]. Asked about Titus’s remains, Appellant replied that he had not yet “received” them, and informed Williams that “it may take a little longer.” [RR V-238].

Confused, but believing Appellant “knew what he was talking about,” Williams waited and called back a week later. [RR V-238-39]. By now, two weeks after the memorial service, Williams and her husband, the baby’s father, were “irritated” by the unexplained delay, and her husband informed Appellant that they were tired of waiting. [RR V-239]. Appellant asked the couple to “bear with me,” and assured them that it would “not be that much longer.” [RR V-239].

Williams followed up her Friday call with another call on Monday. [RR V-239]. Appellant called her back later in the day and told her that she could pick up the infant’s remains the next day. [RR V-239-40]. The child’s father went by the funeral home the next day, May 27th. [RR V-240]. Appellant was not there when

he arrived, but subsequently pulled up, jumped out of a hearse, handed an urn to William's husband, saying "bye" as strode back to his car, leaving the infant's father standing in the parking lot with the remains in his hands. [RR V-240-41].

When the infant's parents inspected the container the urn was in, they found that the seal had been broken. [RR V-241]. Inside, they discovered that the name plate on the bottom of the urn had been torn off. [RR V-241]. Recalling that Appellant had shown her an urn containing another child's ashes when she had first consulted him weeks before, Williams called Appellant and asked outright if the remains she had been given were her son's. [RR V-241-42]. Appellant confirmed that they were, and offered to provide a new name plate. [RR V-242]. Williams placed the urn on her mantel, because her "main concern" had been to bring her son home. [RR V-242-43].

Williams called the medical examiner's office after learning from news reports that bodies had been found in the mortuary. [RR V-244]. The ME confirmed that one of the two infant bodies found there was the Williams' child. [RR V-245-46; VI-19, 29-33, 37]. The ashes given to Williams were later identified through DNA as those of another child, Jabarei Clark. [RR XI-30].

F. Patricia Baptiste

Patricia Baptiste died on June 30, 2014. [RR IX-204-05]. She had been living with her niece, Margaret Francois, but when she became ill, she was moved to a hospital and then to a nursing home. [RR IX-204]. Originally from Baltimore, Baptiste had only moved to Texas after her husband died so she could be with Francois. [RR IX-204-05]. She had asked Francois to have her cremated and buried next to her husband in Baltimore. [RR IX-204-05].

Anticipating Baptiste's demise, and seeking to fulfill her wishes, Francois contacted the Johnson Family Mortuary to make the necessary preparations and ascertain how much a cremation would cost. [RR IX-205-06]. She chose them because the mortuary had handled the funeral for Francois's mother in 2011, though at that time Francois had dealt with someone other than Appellant. [RR IX-211]. After Baptiste died, Appellant came to Francois's house on July 1, 2014 and discussed arrangements for cremating Baptiste, though he was not licensed to do so and as of that day the mortuary did not have an FDIC. [RR VIII-91, 96; IX-206-07]. During their discussion, Francois mentioned that her brother – who was suspicious that they might not receive the correct ashes – wished to view the cremation. [RR IX-210]. Because of the upcoming holiday, they decided to finalize the contract the following week. [RR IX-207].

At Appellant's request – he claimed the mortuary's credit card machine was down – Francois gave Appellant a cashier's check for \$1,500 when he returned to her house on July 7, 2014. [RR IX-206-211; State's Exs. 10, 77 & 78]. The money was specifically to cremate Baptiste, and Francois made a notation to that effect on the check. [RR IX-208, 211-12]. Appellant informed Francois that Baptiste's remains would not be cremated for another week, and cautioned her that she should "not [be] in a hurry to get the ashes." [RR IX-213]. Appellant asked if Francois's brother still wished to view the cremation, indicating that if so, there would be an additional fee. [RR IX-210]. Francois did not even ask how much it might cost, but quickly dismissed the idea. [RR IX-210-11]. Appellant later told investigators, however, that Baptiste had not been cremated because he was waiting for Francois to make an extra payment so her brother could view the cremation. [State's Ex. 10].

The check Appellant obtained from Francois was deposited by Rachel Hardy in the mortuary's bank account the same day Appellant received it from Francois. [RR VIII-152-155, 165; State's Exs 50, 57]. Hardy not only knew that the mortuary did not have an FDIC – one hadn't been paid in over a year – but having been trained in the Funeral Commission's system for obtaining death certificates and other documents necessary for cremating a body, and having actually created

the account that the mortuary had been using without authorization, she was aware that legally a death certificate could not be obtained without one. [RR X-67, 71-72, 108; State's Exs. 50, 57, 211; Defense Ex. 6]. The mortuary records reveal that numerous charges were made on the business's debit card for death certificates – though they had slowed by July to a trickle – so she must also have been aware that death certificates had been procured without an FDIC. [RR VIII-151-52; X-77-78, 84; State's Ex. 50]. She must also have been aware that Francois's check was specifically for a cremation, since it was written on the check. [RR IX-209; State's Ex. 77].

The mortuary attempted to enter a report of death for Baptiste on July 1, but the system would not accept the information – Pierce had resigned as FDIC and had his number removed from the TER account. [RR IX-158-59]. Forensic analysis of the Johnsons' accounts determined that the \$1,500 Francois paid was not used for any expenses involved in running the funeral home, but spent instead on obvious personal expenses and non-business items and obligations. [RR VIII-171-75].

THE INDICTMENT

The first count of the indictment charged that Appellant “did . . . unlawfully appropriate, by acquiring or otherwise exercising control over property, to wit: money, of the value of \$1,500 or more, but less than \$20,000, with intent to deprive the owner, Margaret Francois, of the property.” [CR I-8]; *see also Johnson*, 513 S.W.3d at 196.

The second count alleged that Appellant “did . . . unlawfully appropriate, by acquiring or otherwise exercising control over property, to wit: money, of the value of \$1,500 or more, but less than \$20,000, with intent to deprive the owners, listed below, of the property, and all said property was obtained pursuant to one scheme or continuing course of conduct.” [CR I-8]; *see also Johnson*, 513 S.W.3d at 199, 200.

THE SUBSTANTIVE ELEMENTS OF THE OFFENSE

A person commits theft if the person (1) unlawfully appropriates (2) property (3) with the intent to deprive (4) the owner of the property. *See* Tex. Penal Code Ann. § 31.03(a) (West Supp. 2016); *Price v. State*, 456 S.W.3d 342, 346 (Tex. App. – Houston [14th Dist.] 2015, pet. ref’d). An appropriation of property is unlawful if it is without the owner’s effective consent. *See* Tex. Penal Code Ann. § 31.03(b)(1) (West Supp. 2016); *Price*, 456 S.W.3d at 346. Consent is not

effective if it is induced by deception or coercion. *See* Tex. Penal Code Ann. § 31.01(3) (West Supp. 2016); *Price*, 456 S.W.3d at 346. Deprive is “to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.” Tex. Penal Code Ann. § 31.01(2)(A) (West Supp. 2016).

If theft occurs in connection with a contract, there must be proof that the appropriation was the result of a false pretext, or fraud, and the person intended to deprive the owner of the property at the time the property was taken. *See Taylor v. State*, 450 S.W.3d 528, 536 (Tex. Crim. App. 2014); *Wirth v. State*, 361 S.W.3d 694, 698 (Tex. Crim App. 2012); *Price*, 456 S.W.3d at 346. The fact that partial or even substantial work has been done on a contract will not invariably negate either the intent to deprive or the deception necessary to establish the unlawfulness of the initial appropriation. *See Taylor*, 450 S.W.3d at 537. “A contractor may still be convicted of theft under circumstances – to be sure, circumstances beyond the mere ‘failure to perform the promise in issue’ - in which a rational trier of fact could conclude that he *never* intended, even at the outset, to perform fully or satisfactorily on the contract, and always harbored the requisite intent or knowledge to deceive his customer and thereby deprive him of the value of at least a substantial portion of the property thus unlawfully appropriated.” *Id.* (emphasis

in original). Intent may be inferred from the surrounding circumstances. *See Price*, 456 S.W.3d at 346.

Money constitutes “property” for the purposes of the theft statute. *See* Tex. Penal Code Ann. § 31.01(5)(c) (West Supp. 2016). Under the statute, “appropriates” means to “to acquire or otherwise exercise control over property other than real property.” *See* Tex. Penal Code Ann. § 31.01(4)(B) (West Supp. 2016).

THE MAJORITY OPINION AND THE DISSENT

I. The Majority Opinion

In a 2-1 split, the court of appeals reversed the jury’s verdicts on both charges on the grounds that the evidence was legally insufficient to support either verdict. *Johnson*, 513 S.W.3d at 199, 201.

As to the first count, Justices Dauphinot and Gardner, relying on the Uniform Commercial Code and *Orr v. State*, 836 S.W.3d 315 (Tex. App. – Austin 1992, no pet.), declared that a check “is not money” but a “negotiable instrument” whose owner is the “holder in due course.” *Johnson*, 513 S.W.3d at 199. A holder in due course “must be a holder or have a security interest in the instrument.” *Id.* The majority then reasoned that “when Appellant possessed the check, he did not possess the \$1500,” but a “negotiable instrument” payable “only to the funeral

home and of no significant value except to the funeral home.” *Id.* Appellant thus “never acquired or otherwise exercised control over the money,” the majority concludes. *See id.*

The majority of the panel rejected the jury’s verdict on the second count on the basis that since Appellant had performed some of the services he had contracted for, the “State failed to prove an intent to perform only part of the services contracted for at the time Appellant received the money on behalf of the funeral home.” *Johnson*, 513 S.W.3d at 201.

II. The Dissenting Opinion

The dissenting opinion by Chief Justice Livingston observed that the majority “recites but incorrectly applies” the standard of review. *See Johnson*, 513 S.W.3d at 202 (Livingston, C.J., dissenting). Citing Section 7.23(a) of the Penal Code, Chief Justice Livingston asserted that the court should hold “that when appellant exercised control over the cashier’s check, he also exercised control over the money it represented, either on the mortuary’s behalf or on his own behalf.” *See Johnson*, 513 S.W.3d at 203 (Livingston, C.J., dissenting).

The dissent also concluded that “applying the deferential standard of review properly” by “deferring to the jury’s resolution of competing inferences concerning appellant’s intent,” the jury “could have inferred his intent to deceive customers of

the mortuary from the moment he entered into the contracts” from the substantial circumstantial evidence introduced. *See id.* at 204 (Livingston, C.J., dissenting).

**THE PANEL MAJORITY ERRED IN FAILING TO MEASURE THE
EVIDENCE AGAINST A HYPOTHETICALLY CORRECT JURY
CHARGE AND FAILING TO VIEW THE EVIDENCE IN THE LIGHT
MOST FAVORABLE TO THE VERDICT**

The majority erred in reversing Appellant’s convictions on the grounds of insufficient evidence because it failed to view the evidence in the light most favorable to the verdict and failed to measure the sufficiency of the evidence against a hypothetically correct jury charge.

I. The Proper Standard of Review

Claims that the evidence is legally insufficient to support the jury’s verdict must be assessed under a standard of review which asks whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier-of-fact would have found the substantive elements of the criminal offense as defined by state law beyond a reasonable doubt. *See Adames v. State*, 353 S.W.3d 854, 861 (Tex. Crim. App. 2011); *see also Jackson v. Virginia*, 433 U.S. 307, 319 n.12 (1979).

Viewing the evidence in the light most favorable to the verdict “means that the reviewing court is required to defer to the jury’s credibility and weight determinations.” *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). A

court of appeals role “is restricted to guarding against the rare occurrence when a factfinder does not act rationally” and it must “defer to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008).

II. Measuring the Evidence Against a Hypothetically Correct Jury Charge

The sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *See Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009). “Such a charge is one that accurately sets out the law, is authorized by the indictment, does not necessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.*

In the present case, the court of appeals, relying on *Orr*, concluded that since the indictment charged Appellant with theft of “cash,” and proved only that he received a “check,” he did not exercise control over “money” as alleged, and thus the evidence is insufficient to support the jury’s verdict. *See Johnson*, 513 S.W.3d at 197-98.

Generally, however, there is no variance between an indictment which alleges the theft of “money” and proof at trial that the defendant illegally obtained

a check which was converted to cash. *See Jackson v. State*, 646 S.W.2d 225, 225 (Tex. Crim. App. 1983); *Kirkpatrick v. State*, 515 S.W.2d 289, 293 (Tex. Crim. App. 1974); *Mueshler v. State*, 178 S.W.3d 151, 154 (Tex. App. – Houston [1st Dist.] 2005, pet. ref’d) (and cases cited); *see also Villarreal v. State*, No. 13-15-00037-CR, 2016 WL 6126031, at *13 (Tex. App. – Corpus Christi October 20, 2016, no pet. h.).

In a few cases, such as *Orr*, the courts have concluded that the evidence is insufficient to prove theft of money where the prosecution failed to prove that the check or other instrument had not been converted by deposit or conversion to cash. *See Orr v. State*, 836 S.W.2d 315, 318-19 (Tex. App. – Austin 1992, no pet.) (evidence insufficient to prove theft of money where the State failed to prove that several money orders were ever cashed); *Chachere v. State*, 811 S.W.2d 135, 136 (Tex. App. – Houston [1st Dist.] 1991, pet. ref’d) (stolen insurance draft never negotiated or otherwise converted to cash); *Lieske v. State*, 60 Tex. Crim. 276, 131 S.W. 1126, 1127 (1910) (evidence insufficient where prosecution failed to prove that stolen check was actually cashed).

Here, the State proved that Appellant gave the check to Johnson, his wife, knowing that she had cashed similar checks in the past, and further proved that Francois’s check was indeed deposited into the mortuary’s account. [RR VIII-125-

155, 165; State’s Exs 50, 52, 55-59]. This alone was sufficient to prove that the check was converted into “money.” *See Villarreal v. State*, No. 13-15-00037-CR, 2016 WL 6126031, at *1, 14 (transfer of funds from one bank account to another constituted theft of “currency”). Furthermore, the State also proved that after the check was deposited, Appellant’s wife withdrew sums that were actually greater than \$1500, establishing that Johnson converted the check into “money.” [RR VIII-165-175; State’s Ex. 63]. *Orr* is thus inapposite to the present cause.

If the court chose to ignore both the line of cases holding that the deposit of the check constitutes theft of “money,” and evidence that Appellant intended that the check be cashed and that money was actually withdrawn from the account, then it should have measured the evidence against a hypothetically correct jury charge.

The type of property appropriated is not a substantive element of the offense of theft that is required to be included in a hypothetically correct jury charge. *See Villarreal v. State*, 504 S.W.3d 494, 515 (Tex. App. – Corpus Christi 2016, pet. filed); *see also* Tex. Penal Code Ann. § 31.01(5) (West Supp. 2016); Tex. Penal Code Ann. § 31.03(a) (West Supp. 2016); *Smith v. State*, No. 14-95-01354-CR, 1998 WL 724601, at *2 (Tex. App. – Houston [14th Dist.] October 8, 1998, pet ref’d) (not designated for publication) (“where the indictment alleges theft under section 31.03, the State need only prove that the defendant appropriated a

document that represents a thing of value. The State is not required to prove that the document is a specific type or form”).

If the majority is correct that Appellant should have been charged with theft of a “check,” rather than money – there is no dispute that he took *something* from Francois – then the majority should have measured the sufficiency of the evidence against a hypothetically correct jury charge that alleged “a document representing anything of value” or simply “a check” rather than “money.” *See Villarreal*, 504 S.W.3d at 514-15. Measured against such a hypothetically correct charge, even the majority’s cramped interpretation of the facts is sufficient to sustain the verdict: Appellant appropriated, by acquiring or otherwise exercising control over property, to wit: a document representing anything of value, of the value of \$1,500 or more, but less than \$20,000, with intent to deprive the owner, Margaret Francois, of the property.³

³ The face amount of a check is presumptive evidence of its value. *See Simmons v. State*, 109 S.W.3d 469, 475 (Tex. Crim. App. 2003); *Christiansen v. State*, 575 S.W.2d 42, 44 (Tex. Crim. App. 1979).

Additionally, a hypothetically correct jury charge would include not just a parties instruction under Section 7.02(a)(2), but, as the dissent points out, an instruction under Section 7.23(a).⁴ *See Garza Vega v. State*, 267 S.W.3d 912, 915-16 (Tex. Crim. App. 2008) (sufficiency of the evidence must be measured against hypothetically correct parties charge); *see also Johnson*, 513 S.W.3d at 203 (Livingston, C.J., dissenting). Under Section 7.23(a), an individual is criminally responsible for the conduct that he performs in the name of or on behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf. Tex. Penal Code Ann. § 7.23(a); *See id.* at 203 (Livingston, C.J., dissenting).

Appellant was the only person from the mortuary to deal with Francois, and he had agreed to have her aunt's body cremated and return the ashes to her so that she could bury the cremains in Baltimore. [RR IX-206-12]. He never informed her that the mortuary was operating illegally without an FDIC or that the FDIC number it was using had been suspended, and it could not obtain a death certificate or other necessary documents without one. [RR VIII-91; IX-212]. Appellant also knew that the mortuary – through him – had contracted with other clients to

⁴ The majority also found the evidence insufficient to support the parties charge under Section 7.02(a)(2), concluding that there was no evidence of Johnson's "wrongdoing," ignoring evidence that she deposited the check knowing it was for Baptiste cremation and that the mortuary did not have an FDIC to legally obtain the necessary documents for cremation. *See Johnson*, 513 S.W.3d at 197-98.

cremate bodies, had failed to do so, and had given the cremains of strangers to recent clients while representing them to be the ashes of bodies that had not yet been cremated. [RR V-72-82; VI-17-18, 23-29, 34-37; VIII-42-43, 107-11; IX-139-65, 223-25, 234-35; X-138; XI-30-31; State's Exs. 35, 81]. Appellant was also aware of the very strained financial circumstances under which the mortuary was operating. [RR VIII-164; XI-50; State's Ex. 10].

From these circumstances the jury could have reasonably inferred that at the time Appellant entered into the contract with Francois, he did not intend to complete the contract – that he intended, as he had with other clients, to defer cremating Baptiste's body to the last possible moment, for weeks or perhaps months - but to return other ashes to Francois and claim they were Baptiste's. Francois had not paid simply to have Baptiste's body cremated, but to have the body cremated and receive her ashes for burial. [RR IX-207, 212-13]. The jury could reasonably conclude that at the time of the contract, Appellant did not intend to live up to that part of the bargain, as he had failed numerous times to do that very thing with other clients. Thus, even if, as the majority maintains, "the obligation to perform the contract with Francois was the obligation of the funeral home," Appellant was criminally responsible for the funeral home's theft under Section 7.23(a).

In rejecting this evidence, and the reasonable inferences from it, the majority improperly reweighed the evidence and placed its assessments of the evidence above those of the jury, and further failed to measure the evidence against a hypothetically correct jury charge. *See Villarreal*, 286 S.W.3d at 327; *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988) (“It is not the reviewing court’s duty to disregard, realign, or weigh evidence. This the fact finder has already done”). The court therefore erred in reversing Appellant’s conviction on the first count of the indictment.

The majority also found that the evidence was insufficient to support the jury’s verdict under the second count on the basis that the mortuary partially performed the contracts with each of the victims, and therefore there was “no evidence that Appellant intended to deprive” the owners of their property. *See Johnson*, 513 S.W.3d at 201. As the dissent observes, however, the majority’s inference that Appellant’s partial performance constitutes evidence that he intended to complete the contracts “is perhaps one reasonable inference but not the reasonable inference that the jury chose.” *See Johnson*, 513 S.W.3d at 204. (Livingston, C.J., dissenting). Viewing the evidence in the light most favorable to the verdict – the correct standard of review – the jury could also have found Appellant guilty of the second count of the indictment.

The jury could infer Appellant's intent to deprive at the time of the contracts from evidence that he told each client that the respective remains would be cremated and the cremains returned to them; that the remains were not cremated; and that Appellant knowingly substituted the cremains of others and represented that the ashes were those for which the clients had contracted. [RR V-235-37, 241-42, 269-70, 272-74, 276-78, 280-82; VIII-109-12; IX-189-90, 195-99, 160-61; VI-32-33; XI-30; State's Exs. 26, 27, 271, 272].

The jury could further infer intent to deprive from evidence that Appellant had knowingly substituted other cremains for other clients; that he had failed to cremate at least six bodies; that he had failed to cremate other bodies for extended periods of time; and that he had retained possession of ashes that had been cremated months, and even years, before. [RR V-72-82; VI-17-18, 23-29, 34-37; VIII-42-43, 107-11; IX-139-65, 223-25, 234-35; X-138; XI-30-31; State's Exs. 35, 81]. The jury could also infer intent to deprive at the time of the contract from the perilous finances of the mortuary. [RR VIII-15, 74-75, 150-52, 155-605; IX-9-10, 31, 62-63, 65, 78-79; XI-39-40, 42; X-44-50; State's Ex. 60]. The jury could also infer Appellant's intent from his failure to comply with the requirements of an FDIC, who would have closely supervised client contacts and properly regulated the performance of contracts. [RR VIII-65, 76-77, 79-80, 82, 85-86, 90-91, 102-

03; IX-47-50, 61-62, 66-67, 69-70, 95, 118-19, 189; State's Exs. 29 & 46]. Finally, the jury could infer Appellant's intent to deprive from the patent lies that he told clients regarding delays in the cremation of remains and their return. [RR V-238-40; VIII-109-11; IX-195-97, 213, 220-23].

Partial performance is not always a defense to theft. *See Taylor v. State*, 450 S.W.3d 528, 537 (Tex. Crim. App. 2014) ("the fact that partial or even substantial work has been done on a contract will not invariably negate . . . the intent to deprive"). The jury could infer from Appellant's repeated partial performances, followed by his repeated failures to cremate the bodies, that partial performance was actually part of the scheme to defraud; that is, Appellant intended by his partial performance to deceive clients into believing that he had actually performed the cremations, too. As the prosecution observed in closing, [RR XI-76, 78], Appellant's delays in taking appropriate steps to cremate bodies left in his care constituted a "Ponzi scheme" in which clients paid Appellant money to cremate the remains of loved ones; Appellant took the money, claimed to have performed the service, and returned other cremains; and Appellant kept the money until such time as other clients paid to have remains cremated, when he started the process all over again.

Here again, the majority has refused to defer to the jury's reasonable

conclusions and has instead substituted its own assessment of the evidence in the guise of “guarding against the rare occurrence” of jury irrationality. The jury did not act irrationally in the present case, and the majority, acting as a “thirteenth juror” has not only erred in resolution of Appellant’s appeal, but has stepped outside its proper role in the judicial system.

CONCLUSION

The court of appeals erred in reversing Appellant's theft convictions.

PRAYER

The State prays that Appellant's convictions be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the State's brief has been e-served to opposing counsel, the Hon. Robert K. Gill, BOB@GILLBRISSETTE.COM, 201 Main Street, Suite 801, Fort Worth, Texas, 76102, on this, the 24th day of May, 2017.

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